UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 33

Docket No. NY-0752-08-0242-I-3
NY-0353-09-0217-I-1

Jorge Gonzalez-Acosta,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 18, 2010

Elaine Rodriguez-Frank, Esquire, San Juan, Puerto Rico, for the appellant.

Joy C. Vilardi-Rizzuto, Esquire, San Juan, Puerto Rico, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that affirmed the agency's removal action and dismissed his restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the PFR, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the ID as MODIFIED, still SUSTAINING the appellant's removal.

BACKGROUND

¶2 The appellant was removed from his position as a Housekeeping Aid, WG-3566-3, at the Veterans Affairs Medical Center (VAMC) in San Juan, Puerto Rico, effective April 18, 2008, for inability to perform the physical requirements of the position. Initial Appeal File (IAF), MSPB Docket No. NY-0752-08-0242-I-1 (IAF-1), Tab 8, Subtabs 4B, 4P. The appellant asserted that the removal constituted disability discrimination because of the agency's failure to accommodate his back condition. *Id.*, Tab 1. He requested a hearing. *Id.* During the processing of the case, the administrative judge docketed a restoration appeal, based on the appellant's contentions that he had incurred on-the-job injuries, been placed on limited duty, and was serving in a permanent limited duty position performing clerical duties when he was removed. IAF, MSPB Docket No. NY-0752-08-0242-I-2 (IAF-2), Tab 27; IAF, MSPB Docket No. NY-0353-09-0217-I-1 (IAF-4). The administrative judge joined the removal and restoration appeals for processing and held the hearing the appellant had requested. IAF, MSPB Docket No. NY-0752-08-0242-I-3 (IAF-3), Tabs 4, 13.

¶3 The administrative judge issued an ID finding that the agency established that the appellant was physically unable to perform the duties of a Housekeeping Aid. IAF-3, Tab 15 (ID) at 5-9. The administrative judge also held that the appellant failed to prove his affirmative defense of disability discrimination because he did not identify a vacant, funded position at or below his current grade level to which he could have been reassigned. *Id.* at 10. The administrative judge found a nexus between the appellant's inability to perform the duties of his position and the efficiency of the service. *Id.* at 11. Finally, the administrative judge determined that the penalty of removal was reasonable. *Id.* at 12-13. The administrative judge dismissed the appellant's restoration to duty claim on the grounds that there was no evidence of an Office of Workers' Compensation Programs (OWCP) determination that the appellant had in fact suffered a compensable injury. *Id.* at 9-10.

¶4 The appellant has filed a PFR in which he asserts that the administrative judge erred in precluding the testimony of two witnesses he requested. Petition for Review File (PRF File), Tab 1. The agency has responded in opposition to the PFR. PRF File, Tab 3.

ANALYSIS

¶5 The appellant's PFR fails to establish any error by the administrative judge and is therefore denied. 5 C.F.R. § 1201.115(d). We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to clarify the ID's analysis of the appellant's affirmative defense of disability discrimination.

The appellant did not prove his affirmative defense of disability discrimination based on a claim of failure to provide reasonable accommodation.

¶6 Although as a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973, the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act and are applied to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Further, the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act were superseded by the ADA regulations. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005) (stating that 29 C.F.R. § 1614.203(g) and other portions of the regulations at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); 29 C.F.R. § 1614.203(b).

¶7 In this appeal, the administrative judge did not make the threshold determination of whether the appellant is a person with a disability within the meaning of the Rehabilitation Act. Further, in addressing the agency's accommodation obligation, the administrative judge cited 29 C.F.R. § 1614.203(g), which is no longer in effect. For the reasons explained below, we

find that the appellant is a person with a disability, but that he did not prove he was denied reasonable accommodation.

The appellant is a person with a disability.

¶8 The ADA Amendments Act of 2008 (ADAAA or Amendments), which provide that the definition of disability should be interpreted more broadly than before, became effective on January 1, 2009. *See* Pub. L. No. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12101 *et seq.* Because the appellant's removal took place prior to the effective date of the ADAAA, the appeal presents a question of whether the Amendments are retroactive and what definition of disability applies. Neither the Board nor its reviewing court has yet decided the retroactivity question.[1] We need not resolve the question now, however, because we find that the appellant is a person with a disability even under the more restrictive pre-ADAAA standard.

¶9 Under the ADA, a disability is defined, in relevant part, as a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(A).[2] The EEOC's pre-ADAAA regulations provide that a person is substantially limited in a major life activity,[3] and thus has a disability, if he is unable to perform the activity or is significantly restricted in doing so

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[1] *But see Lytes v. DC Water and Sewer Authority*, 572 F.3d 936, 939-42 (D.C. Cir. 2009) (finding that the ADAAA is not to be applied retroactively); *see also* Equal Employment Opportunity Commission (EEOC) Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html (stating at question one that the ADAAA does not apply to alleged discriminatory acts that occurred prior to January 1, 2009).

[2] Prior to the ADAAA, the definition was found at 42 U.S.C. 12102(2)(A) (2008).

[3] The term "major life activity" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. 29 C.F.R. § 1630.2(i); Appendix to 29 C.F.R. part 1630, discussing 29 C.F.R. § 1630.2(i).

compared to the average person. 29 C.F.R. § 1630.2(j); *Clemens v. Department of the Army*, 104 M.S.P.R. 362, 366 (2006). Prior to the passage of the Amendments, the ADA was held "to create a demanding standard for qualifying as disabled." *Toyota Motor Mfg., Kentucky, Inc., v. Williams*, 534 U.S. 184, 197 (2002); *Pinegar*, 105 M.S.P.R. 677, ¶ 36.[4]

¶10 The appellant did not testify regarding his back condition other than to say he was injured while serving as a paratrooper and again on the job at the agency and that he could not perform the essential functions of the Housekeeping Aid position. Hearing Tape (HT) 3, side 1. He did not discuss the particular limitations resulting from his condition. However, the agency found the appellant unfit for duty based on a July 20, 2007 report from a physician who had treated him since 2003. IAF-1, Tab 8, Subtabs 4Q, 4R. As discussed more fully in the ID at 6-7, the report shows that the appellant had persistent lumbar pain due to bulging and deteriorating discs. *Id.*, Subtab 4R. His physician stated that the appellant should avoid carrying and lifting more than 20 pounds, flexing forward, stair climbing, and prolonged sitting and standing. *Id.* We find that these limitations are sufficient to find the appellant has a disability within the meaning of the Rehabilitation Act, even under the stringent pre-ADAAA standard. *See Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 561 (1997) (finding that a mail processor who had a 20-pound lifting limitation and was unable to sit or stand for more than 1 hour or bend repetitively, due to degenerative disc disease, was disabled because he was substantially limited in the major life activities of lifting, sitting, standing and bending); *Turtle v. U.S. Postal Service*, EEOC Appeal No. 0720080025 at 7 (Mar. 5, 2009) (stating the Commission has

[4] The ADAAA stated that EEOC's regulation was inconsistent with Congressional intent by expressing too high a standard and rejected the U.S. Supreme Court's interpretation of the term disability in *Toyota Motor Manufacturing*. Pub. L. No. 110-325, § 2(a)(8), codified at 42 U.S.C. 12101 Note.

determined that a 20-pound lifting restriction is sufficient to constitute substantial impairment in the major life activity of lifting).

The appellant did not prove he was denied reasonable accommodation.

¶11 The ADAAA did not change the statutory provision regarding reasonable accommodation relevant here. Pub. L. No. 110-325, § 6(h). An agency must provide reasonable accommodation to the known limitations of a qualified individual with a disability unless to do so would impose an undue hardship on the operation of its programs. 42 U.S.C. § 12112(a), (b)(5)(A); *Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 11 (2006); 29 C.F.R. § 1630.9. A qualified individual with a disability is a person who has a disability and can, with or without reasonable accommodation, perform the "essential functions" of the position in question. 42 U.S.C. § 12111(8); *Paris*, 104 M.S.P.R. 331, ¶ 11; 29 C.F.R. § 1630.2(m). Reasonable accommodation may entail modifying or adjusting the duties of the position at issue, or reassigning the employee to a vacant position whose duties the employee can perform. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o).

¶12 The appellant's Housekeeping Aid position required continuous walking, standing, stooping, lifting (including weights of up to 50 pounds), pushing, pulling, and bending. IAF-1, Tab 8, Subtab 4DD. The appellant testified that he could not perform the essential functions of the position and that there was no accommodation in the position that would enable him to do so. HT 4, side 1.

¶13 The appellant's contention throughout the proceedings was that he had been accommodated since 2002 by being reassigned to clerical duties and that he should have been allowed to continue to perform these duties rather than being removed. *See* IAF-2, Tabs 24, 25. The administrative judge correctly held, however, ID at 8, that the record contains no evidence the agency ever formally reassigned the appellant to a permanent limited or light duty position; rather, he continued to encumber the Housekeeping Aid position, although he was

performing different duties.[5] Provision of such limited or light duty tasks that do not constitute a separate position is not a reasonable accommodation. *See Collins*, 100 M.S.P.R. 332, ¶ 13. Further, the agency is not required to restructure a job to eliminate its essential functions, *Henry v. Department of Veterans Affairs*, 100 M.S.P.R. 124, ¶ 10 (2005), nor is it required to create a new position for the appellant in order to provide reasonable accommodation. *Collins*, 100 M.S.P.R. 332, ¶ 13; *Henry*, 100 M.S.P.R. 124, ¶ 13 n.5; *see also EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, www.eeoc.gov/policy/docs/accommodation.html, at 13, 19.

¶14 The appellant was entitled to be considered for reassignment to a vacant position for which he was otherwise qualified as a form of reasonable accommodation. *See* 42 U.S.C. § 12111(9); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1301-05 (D.C. Cir. 1998) (en banc); 29 C.F.R. § 1630.2(o)(ii). An appropriate position would be one for which he was qualified by skill, experience and education and which was equivalent in terms of pay, status, and other relevant factors. 29 C.F.R. part 1630 Appendix, § 1630.2(o); *EEOC Enforcement Guidance* at 18-19. An individual can be reassigned to the next lower level position for which he is qualified if an equivalent position is not available. *EEOC Enforcement Guidance* at 19.[6] An agency is not required to

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[5] Although they were not admitted into the record at the hearing, we note that the 2003-2007 performance evaluations proffered in the appellant's prehearing report corroborate that he continued to hold the Housekeeping Aid position. IAF-2, Tab 24, Att. 1-11.

[6] Geographical location is among the factors to be considered, but an agency's reassignment obligation is not limited by geographical area, facility or personnel system. *EEOC Enforcement Guidance* at 19-20. Moreover, the employee need not compete for a vacant position. *Id.* at 21. The regulation cited in the ID, by contrast, required reassignment only to a funded vacant position located in the same commuting area at the same or the next highest grade or level, and serviced by the same appointing authority. 29 C.F.R. § 1614.203(g) (2001). It also provided that if a vacancy had been

promote an individual in order to provide reasonable accommodation. *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 640 (Fed. Cir. 2004); *Taylor v. Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 8 (2007). In this case, the appellant, who had earned a B.A. in accounting, requested reassignment to a vacant administrative position. HT 3, side 2. The position, however, was higher graded, and so the agency rejected the appellant's request in both its proposal and decision to remove him. IAF-1, Tab 8, Subtabs 4B, 4P. The appellant testified he knew of no other positions to which he could have been reassigned. HT 3, side 2; HT 4. Moreover, the agency produced as a hearing exhibit a list of vacant positions at the San Juan VAMC at the time of the appellant's removal, showing that the only vacancies at or below his grade level were in the food service and laundry. IAF-3, Tab 14. The position descriptions show that these positions had stringent physical requirements similar to or greater than those of the Housekeeping Aid. *Id.* Therefore, the appellant would not have been qualified for those positions.

¶15 The record does not contain evidence showing that the agency considered the appellant for any position other than the administrative job he requested or that it otherwise engaged in the interactive process through which a reasonable accommodation is identified. *See, e.g.*, HT 1 (testimony of Grissel Silva, Chief of the Environmental Program, regarding the appellant's injuries and assignments); HT 3, side 1 (testimony of Nancy Reissener, Acting Director of the VA Caribbean Healthcare System and deciding official on the appellant's removal). The agency asserted on appeal that the appellant never made an accommodation request. IAF-2, Tab 25; HT 1 (testimony of Silva). However, "an employee only has a general responsibility to inform his employer that he needs accommodation for a medical condition." *Paris*, 104 M.S.P.R. 331, ¶ 17

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posted, the agency was only required to consider the employee requiring accommodation on an equal basis with other applicants. *Id.*

(citing 29 C.F.R. part 1630 Appendix, § 1630.2(9)); *see also EEOC Enforcement Guidance* at 5 (to make an accommodation request, an individual need only let the employer know that he needs an adjustment or change at work for a reason related to a medical condition and need not use the words "reasonable accommodation"). Once the employee does so, the employer must engage in an interactive process to determine an appropriate accommodation. *Paris*, 104 M.S.P.R. 331, ¶ 17; 29 C.F.R. § 1630.2(o)(3); *see also EEOC Enforcement Guidance* at 6. In this case, the appellant had requested reassignment to an administrative position prior to his removal. HT 3, side 1 (testimony of the appellant). Such a request is a request for a reasonable accommodation. *Jones v. United Parcel Service, Inc.*, 502 F.3d 1176, 1194 (10th Cir. 2007). Moreover, there is no dispute that the agency was aware of the appellant's medical condition and need for accommodation, since he had been on light or limited duty for approximately 6 years. *See Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003) (accommodation effort triggered where employer has enough information to know of the disability and desire for accommodation). Therefore, under the circumstances of this case, we find that the agency had an obligation to engage in the interactive process and search for a reassignment for the appellant prior to removing him.

¶16 As discussed above, however, the agency ultimately produced evidence at the hearing that there was no appropriate vacancy to which he could be reassigned, and the appellant did not identify any. The failure to engage in the interactive process alone does not violate the Rehabilitation Act; rather the appellant must show that this omission resulted in failure to provide reasonable accommodation. *See McBride v. BIC Consumer Products Mfg. Co.*, 583 F.3d 92, 99-101 (2d Cir. 2009); *Broussard v. U.S. Postal Service*, EEOC Appeal No. 01997106 at 4 (Sept. 13, 2002), *request for reconsideration denied*, Request No. 05A30114 (Jan. 9, 2003). The appellant had the opportunity to make this showing at the hearing, but failed to do so.

¶17 In light of the above evidence, we find that the appellant did not show that he was denied reasonable accommodation and thus did not prove his affirmative defense of disability discrimination. *See Paris*, 104 M.S.P.R. 331, ¶ 24 (to prevail, the appellant must prove, not merely articulate, that the accommodation he seeks is reasonable); *Henry*, 100 M.S.P.R. 124, ¶ 15 (the appellant bears the ultimate burden of proof). Accordingly, the ID sustaining the agency's removal of the appellant is affirmed, as modified herein.

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.